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SERVICE DATE – LATE RELEASE FEBRUARY 23, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34501

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD
— ACQUISITION AND OPERATION EXEMPTION —
IN YORK COUNTY, PA

STB Finance Docket No. 34552

JAMES RIFFIN D/B/A THE NORTHERN CENTRAL RAILROAD —
PETITION FOR DECLARATORY ORDER

Decided: February 23, 2005

For the reasons set forth below, we will revoke the exemption in this proceeding and deny the petition for declaratory order.¹

BACKGROUND

By verified notice filed on April 28, 2004, and served and published in the Federal Register on May 20, 2004 (69 FR 29166), James Riffin d/b/a The Northern Central Railroad (Mr. Riffin or NCR) has invoked the Board's class exemption procedures under 49 CFR 1150.31 for authority to acquire, from the Commissioners of York County, PA, and operate approximately 19 miles of rail line, known as the USRA Line 145, between milepost 35.6 (at or near the Maryland - Pennsylvania line) and

¹ These proceedings have not been consolidated and are being dealt with here in one decision solely for administrative convenience.

milepost 54.6 (Hyde), in York County, PA (the line).² Under the terms of the class exemption procedures, the exemption has become effective.

This proceeding represents Mr. Riffin's second attempt to acquire similar authority. In James Riffin d/b/a The Northern Central Railroad — Acquisition and Operation Exemption — in York County, PA and Baltimore County, MD, STB Finance Docket No. 34484 (STB served and published in the Federal Register Apr. 7, 2004) (69 FR 18420), Mr. Riffin sought authorization to acquire two line segments in Baltimore County, MD, in addition to a slightly longer version of the line involved herein. However, in a decision in that proceeding served on April 20, 2004 (April 20, 2004 Decision), the Board revoked the exemption, stating that issues raised by Maryland could not be answered under the expedited "class exemption" process. NCR was advised that, if it wished to pursue the matter, it should provide more detailed information in the form of an exemption petition under 49 U.S.C. 10502 and 49 CFR 1121, or a full application under 49 U.S.C. 10901 and 49 CFR 1150.

Mr. Riffin instead chose to file a notice of exemption for the necessary authority to acquire and operate the line in York County. That notice of exemption is the subject of the petition to revoke in STB Finance Docket No. 34501.

Separately, NCR seeks a declaratory order addressing when a noncarrier becomes a carrier subject to Board jurisdiction and addressing a number of questions regarding federal preemption of state law.

PETITION TO REVOKE

By petition filed on August 20, 2004, Maryland requests that the Board revoke the exemption. First, Maryland asserts that the exemption should be revoked because the type of service Mr. Riffin intends to provide on the line may not be subject to the Board's jurisdiction. Maryland claims that Mr. Riffin intends to run a "dinner train" over the line solely within Pennsylvania and that the jurisdictional issues need to be explored in-depth in a less summary proceeding.

Second, Maryland maintains that the exemption should be revoked because the notice contains false and misleading information. Specifically, Maryland asserts that the statement in the verified notice of exemption that "York County, PA, the owner of the right-of-way has sent a lease proposal to Riffin,

² On May 18, 2004, the State of Maryland (Maryland) filed a motion for leave to file comments, along with those comments. In its comments, Maryland asserted that the publication of the notice of exemption in this proceeding could directly affect the interests of Maryland and its citizens but stated that it did not have sufficient information to conclude that revocation of the exemption was necessary. NCR replied to Maryland's comments on June 2, 2004.

which Riffin is reviewing” is false. Maryland states, based on correspondence from York County,³ that the Commissioners of York County have not forwarded a lease proposal to Mr. Riffin for the line and that Mr. Riffin has not submitted requested documentation that would provide a basis for sending him such a proposal. Moreover, Maryland maintains that the information in the verified notice of exemption is incomplete because it states that the activities will not affect any historic structures, whereas there are at least four historic structures on the line.

Finally, Maryland asserts that Mr. Riffin is using the Board’s preemptive jurisdiction to circumvent state law. Maryland claims that Mr. Riffin has resumed grading and construction activities in an environmentally sensitive area in the State of Maryland, and, as a result, NCR is in violation of at least four Maryland laws. Maryland has instituted a proceeding in state court to enforce its own laws against NCR to protect the health and quality of the public and its waterways.⁴

Although replies to the petition were due on September 9, 2004, NCR did not file its reply until September 14, 2004. The late filing will be accepted in order to have a more complete record and because its acceptance will not prejudice any party.

In its reply, NCR asserts that Maryland does not have standing to file a petition to revoke. NCR also denies that its verified notice contains false or misleading statements as Maryland alleges and it claims that the facts contained therein have been independently verified by Maryland. NCR asserts that its notice of exemption is non-controversial and in the public interest because, should it acquire the line from York County Commissioners, it would reinstitute service on the line. To that end NCR states that it has purchased several cars, as well as two locomotives, and has acquired track maintenance equipment and a large number of railroad ties, which it plans to use to rehabilitate the line.

Then on September 17, 2004, NCR filed a “Notice of Intent to Construct, Operate and Maintain a Railroad Facility,” which is referred to as NCR’s September supplement. It states that NCR intends to construct, operate and maintain a railroad facility on several properties in Cockeysville, MD, portions of which are owned by the Mayor and City Council of Baltimore (jointly, City).

On October 4, 2004, Maryland filed for leave to file a reply to a reply. Because a reply to a reply is impermissible under our rules at 49 CFR 1104.13(c), and because Maryland’s responsive

³ Letters from York County are attached as exhibits to Maryland’s petition to revoke.

⁴ According to Maryland, on September 9, 2004, the Baltimore County Circuit Court entered a preliminary injunction requiring Mr. Riffin to stabilize his construction site and remove the stockpiled materials that presented the greatest flood risk or risk of sediment pollution.

pleading would not add to our understanding of the issues, Maryland's request for permission to file the reply to a reply will be denied.

Also on October 4, 2004, Maryland filed a motion to strike NCR's September supplement. In support of its motion to strike, Maryland states that NCR's September supplement raises issues that are outside the scope of this proceeding and that there is no basis or authority in the Board's regulations for this type of notice of intent. Additionally, Maryland states that the September supplement should be stricken because NCR does not own the property on which it proposes to construct its railroad facility.

On October 20, 2004, the City filed a motion in support of Maryland's motion to strike, stating that it owns the property at the east end of Beaver Run Lane on which Mr. Riffin wishes to construct a railroad facility (the property). The property is in Baltimore County and serves as a watershed buffer for the Loch Raven Reservoir, which is a source of drinking water for several parts of Maryland. On September 10, 2004, the City's Department of Public Works issued a "Stop Work Order" to Mr. Riffin to curtail grading and bulldozing operations being performed on the property without the City's approval. The City has stated that it has no intention of entering into any agreement with Mr. Riffin for the conversion of its watershed buffer zone into a commercial enterprise. The City, however, remains concerned that Mr. Riffin is attempting to use the Board's expedited notice procedure to further his business plans and cause environmental damage.

On November 1, 2004, NCR filed an answer to Maryland's motion to strike. NCR states that the intended construction described in the September supplement is not related to the proceeding currently before the Board. According to NCR, the notice of intent to construct was drafted prior to the revocation of the exemption in STB Finance Docket No. 34484, discussed above, and portions of the notice of intent to construct are obsolete. The reason for inclusion of the September supplement, according to NCR, was to demonstrate that NCR had notified permitting entities that it intends to construct something. NCR states that the September supplement was not intended to be a request for authority from the Board to construct a railroad facility or line in Maryland.

We will grant Maryland's motion to strike NCR's September supplement because it does not appear to be related to the line in STB Finance Docket No. 34501, inasmuch as the planned facility is located in Cockeysville, MD, approximately 40 miles from the Maryland - Pennsylvania border.

PETITION FOR DECLARATORY ORDER

On September 14, 2004, NCR filed a petition for declaratory order acknowledging its effort to construct a facility on property in Maryland and asking the Board to determine when a noncarrier that files a notice of exemption to acquire and operate a line of railroad becomes a carrier subject to the

Board's exclusive jurisdiction. NCR also submitted numerous questions regarding federal preemption of state law based on specific factual scenarios.

On October 4, 2004, Maryland filed a reply to the petition for declaratory order, asserting that the request is premature because all of the questions posed are based on the assumption that NCR is a Class III rail carrier, which is the issue currently pending before the Board in STB Finance Docket No. 34501. Moreover, Maryland argues that the Board does not need to resolve the issues raised in the petition for declaratory order because they do not present any actual, live controversy.

On November 1, 2004, NCR filed a reply to Maryland's reply, which it entitles an "Answer to Opposition of the State of Maryland to Riffin's Petition for Declaratory Order."

A reply to a reply is impermissible under our rules at 49 CFR 1104.13(c). Inasmuch as Mr. Riffin's pleading would not add to our understanding of the questions raised in the request for a declaratory order, Mr. Riffin's "Answer" will not be accepted into the record.

DISCUSSION AND CONCLUSIONS

A. The Request For Revocation

Maryland has sought revocation on the grounds that the notice contains false and misleading information, and that the operations NCR intends to conduct are outside the Board's authority. NCR responds, at the outset, that Maryland lacks standing to raise these issues. We disagree. Administrative agencies are not bound by the strict requirements of standing that otherwise govern judicial proceedings, but in any event, Maryland would have standing.⁵ The courts have devised a three-part test to determine whether a party has standing to bring an action: (1) the party must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant's challenged conduct; and (3) the injury must be one that is likely to be redressed through a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here, NCR filed a notice of exemption for a line of railroad in Pennsylvania but is evidently attempting to use its resulting authority as authorization to construct facilities on property in Maryland. This activity has caused Maryland actual injury in the form of potentially severe and irreparable damage to its lands and waterway, and is directly traceable to Mr. Riffin's conduct. This injury can be redressed by a revocation of the exemption.

⁵ North Carolina Railroad Company — Petition to Set Trackage Compensation and Other Terms and Conditions — Norfolk Southern Railway, et al., STB Finance Docket No. 33134, slip op. at 2 n.9 (STB served May 29, 1997); Missouri Pacific Railroad Company — Abandonment — In Douglas, Champaign and Vermilion Counties, IL (Westville and Jamaica Branches), Docket No. AB-3 (Sub-No. 103), slip op. at 3 n.4 (ICC served Nov. 3, 1994).

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier, such as NCR, may acquire and operate a rail line only if the Board makes an express finding that the proposal is not inconsistent with the “public convenience and necessity.” That means that the Board must examine and weigh the public interest in the acquisition and operation that is being proposed. Under 49 U.S.C. 10502 and 49 CFR 1121, a party may request an exemption from the formal application procedures of section 10901, on the grounds that full regulatory scrutiny is not necessary to carry out the rail transportation policy and that either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

There are some situations in which approval would be so routine and uncontroversial that there is an expedited “class exemption” procedure allowing the parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR 1150.31, a noncarrier can obtain approval to acquire and operate a line of railroad within 7 days. That authority can later be revoked under 49 U.S.C. 10502(d) or treated as void ab initio if the exemption notice is found to have contained false or misleading information. See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812, 817 (1985), aff’d sub nom. Illinois Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). However, the class exemption process is not appropriate for controversial cases in which a more detailed record is required than what is produced through a notice invoking a class exemption. See, e.g., The Burlington Northern and Santa Fe Railway Company — Acquisition and Operation Exemption — State of South Dakota, STB Finance Docket No. 34645 (STB served Jan. 14, 2005); Riverview Trenton Railroad Company — Acquisition and Operation Exemption — Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002); Jefferson Terminal Railroad Co. — Acquisition and Operation Exemption — Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001).

Here, it appears that NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law. Maryland has shown its legitimate state interest in construction matters within its borders and, once again, has raised sufficient concerns regarding NCR’s proposal to make it inappropriate for NCR to use the expedited class exemption procedures in this case. See April 20, 2004 Decision. The Board has a responsibility to protect the integrity of its processes,⁶ and the Board is concerned that Riffin may be using the licensing process in improper ways. Given the particular circumstances and controversy presented here, the Board will revoke the exemption in STB Finance Docket No. 34501.

⁶ See, e.g., The Land Conservancy of Seattle and King County — Acquisition and Operation Exemption — The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 (STB served Sept. 26, 1997); see also ICC v. American Trucking Ass’ns, 467 U.S. 354, 364-65 (1984) (agency has inherent authority to protect its statutory processes from abuse).

As the Board previously instructed these parties in a decision in STB Finance Docket No. 34484, if NCR chooses to pursue its proposal, it must provide more detailed information in the form of a petition for an exemption under 49 U.S.C. 10502 and 49 CFR 1121, or a full application under 49 U.S.C. 10901 and 49 CFR 1150. Those procedures are designed to elicit a more complete record on which we can determine whether the public convenience and necessity would be met by allowing the acquisition and operation to move forward.

B. The Declaratory Order Request

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission, have exercised broad authority in handling such requests. In doing so, the agency has considered a number of factors, including the significance to the industry and the ripeness of the controversy. See Delegation of Authority — Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). Here, given the context in which it was filed – as an adjunct to a second notice to obtain authority to provide operations about which substantial questions have been raised – we see no basis for granting the petition for declaratory order at this time. The declaratory order petition raises numerous questions about precisely how non-railroad activities could be shoehorned into the 49 U.S.C. 10501(b) preemption so as to shield them from the otherwise legitimate reach of state law. But because NCR has no authority to conduct any railroad operations at this time and because serious questions have been raised about the bona fides of its proposals, we will not speculate on how we might rule if it did have such authority. Accordingly, we decline to institute a proceeding on NCR's petition for declaratory order.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NCR's late-filed reply is accepted.
2. Maryland's motion to file a reply to a reply is denied.
3. Maryland's motion to strike is granted.
4. NCR's "Answer to Opposition of the State of Maryland to Riffin's petition for Declaratory Order" is not accepted.
5. The exemption in STB Finance Docket No. 34501 is revoked.

6. The petition for declaratory order in STB Finance Docket No. 34552 is denied.
7. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary